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No. 337

IN THE

Supreme Court of the United States

October Term, 1949

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Appellant*

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION

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OPINION BELOW

The opinion of the specially constituted district court (R. 69) is reported in 84 F. Supp. 178. The report of the Interstate Comerce Commission (R. 10) is published in 267 I. C. C. 763.

JURISDICTION

The judgment and decree of the three-judge district court was entered on June 17, 1949 (R. 72). Petition for appeal was presented and allowed on August 16, 1949 (R. 73-74). The jurisdiction of this Court is invoked under the Judicial Code as revised by the Act approved June 25, 1948, effective September 1, 1948, entitled Title 28, U. S. Code, Sections 1253 and 2101(b). Probable jurisdiction was noted on October 24, 1949 (R. 80).

QUESTION PRESENTED

This is a case in which because of an alleged statutory time limitation an overwhelming majority of railroad employees to be dismissed and displaced from employment as a result of carrier coordination transactions will receive no protection of the sort Congress sought to provide by Section 5(2)(f) of the Interstate Commerce Act,[1] and the single question presented is whether that section of the Act requires the Commission as a matter of law to limit all protection of employees to a period of four years from the effective date of its order approving the transactions. More particularly, the question raised is whether the specific requirements of the second sentence of Section 5(2)(f) of said Act preclude the Commission from exercising any discretion under the first sentence of said section with respect to the extent in time of employee protection.

STATUTE INVOLVED

The statutory section involved in this case is Section 5(2)(f) of the Interstate Commerce Act, 54 Stat. 906, 49 U. S. C. §5(2)(f), which provides as follows:

[1] Herein sometimes referred to as the Act.

"As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

STATEMENT

In this case the Commission has approved a project nder Section 5(2) of the Interstate Commerce Act which oncededly cannot be completed until sometime in 1954. The great majority of employee dismissals and displacements arising as a result of the project will not occur until fter such completion. The Commission has imposed conitions required by law, purportedly for the protection of ll employees to be dismissed and displaced, which expire y their terms in May 1952. Accordingly, only a few of he employees will receive any protection. The Commission has held that it has no authority under Section 5(2)(f) f the Interstate Commerce Act to extend the period of rotection beyond four years from the effective date of its rder approving the project, i.e., May 17, 1952. The facts iving rise to this situation are as follows:

On November 21, 1947, the City of New Orleans, Louisiana, which, through the agency of its Public Belt Railroad Commission, owns and operates a belt line of railroad, together with certain common carriers by railroad (intervening appellees herein), filed a joint application with the Interstate Commerce Commission for approval of certain proposed transactions. Authority was sought to construct and acquire certain lines of railroad, to jointly own or use lines of railroad, and to abandon certain other lines or operations—all as necessary incidents to the construction of a new railroad passenger terminal at New Orleans and the removal within that city of certain trackage for the purpose of eliminating undesired grade crossings (R. 11-12).

The Railway Labor Executives' Association, appellant herein, intervened in the Commission proceeding as a representative of the interests of the employees of the railroad carriers involved (R. 11). It did not oppose the project, but it urged that if the requested authorizations were granted, they be made subject as required by Section 5(2)(f) of the Interstate Commerce Act,[2] to a fair and equitable arrangement for the protection of railroad employees adversely affected by the transactions (R. 28).

After hearing, Division 4 of the Commission on April 7, 1948, entered its report and order authorizing the proposed transactions (R. 10, 41).

From its review of the evidence of record, the Commission found that employees definitely would be adversely affected by applicants' proposals (R. 32). It did not attempt to state the exact number of employees who ultimately would be affected, but relied upon estimates by a committee of transportation officers that, based on present day conditions, approximately 1022 employees would be affected. How many of that total number will eventually

[2] 54 Stat. 906, 49 U. S. C. § 5(2)(f).

be displaced to positions of less compensation and how many will be dismissed outright is not now known, but it was further estimated that if the manager of the new terminal recruits necessary personnel from employees displaced at the now existing five separate terminals to be abandoned upon completion of the new terminal, between 300 and 350 employees would eventually lose their jobs (R. 27). The Commission also stated that it was admittedly impossible, at the time of its order, to ascertain the identity of the estimated number of employees who would be released from service or otherwise adversely affected when the project was completed (R. 30).

Because of its finding that employees definitely would be adversely affected, the Commission concluded that it was required to provide "a fair and equitable arrangement to protect the interests of employees so affected" and further found that "the benefit of such arrangement necessarily must extend to all the railroad employees affected by the exercise of the authorizations herein granted." (R. 32).[3]

Accordingly, the transactions proposed were approved subject to certain conditions required by Section 5(2)(f) of the Interstate Commerce Act, which purportedly were provided for the protection of all railroad employees who would later be adversely affected as a result of the project.

The specific protective conditions imposed are not set forth in the Commission's report, but are incorporated herein by reference to a previous Commission decision[4] wherein they are specifically enumerated (R. 32-33). These conditions are set forth in Exhibit B to the Complaint

[3] This later finding was made in answer to a contention by applicants that certain employees, approximately 108 grade crossing watchmen and 9 bridge tenders (R. 27), were not entitled to receive protection (R. 31-32).

[4] *Oklahoma Ry. Co. Trustees Abandonment*, 257 I. C. C. 177, 197-201.

(R. 43-48). They represent a system of compensatory allowances which by their terms are operative if and when an employee is adversely affected as a result of the transactions authorized by the Commission, and may be summarized as follows:

In the event an employee is *displaced*, i.e., required to accept a less desirable job, he must be paid a monthly allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation previously received in the position from which he was displaced. The compensation due is determined by a formula prescribed in detail and applied so as to preserve pension or annuity rights as well as other employee privileges such as seniority rights. The benefits thus conferred are limited in time from the date on which the employee is displaced to the expiration of 4 years from the effective date of the Commission's order,[5] provided that such protection shall not continue for a longer period than the period of the employee's service with the carrier prior to the effective date of the Commission's order (R. 44).

In the event an employee is *dismissed* from employment as a result of the abolition of his position by the carrier pursuant to the transactions approved, or the loss of employment due to the exercise of seniority rights by another employee whose position is abolished,[6] he is entitled to receive a monthly dismissal allowance, based on average earnings during the last 12 months of his employment prior to dismissal, for the same protective period as the displaced employees, subject, however, to reduction by amounts earned in other employment, and subject also to the requirement that the dismissed employee must accept employment offered under certain conditions by any of the carriers involved (R. 44-45).

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[5] Referred to as the "protective period".

[6] Commonly referred to as "bumping".

The conditions further provide for the preservation dur-ng the protective period of certain rights and benefits ttaching to the previous employment from which the em-loyee is displaced or dismissed, such as free transporta-ion, pensions, hospitalization, reimbursements for moving xpenses of displaced employees, and reimbursements for osses with respect to the sale or disposition of an em-loyee's home (R. 45-47).

The foregoing conditions have been limited in time, by heir express terms, to expire four years *from the effective late of the Commission's order of approval in this case.* Said effective date was fixed by the Commission at forty lays after April 7, 1948 (R. 43), i.e., May 17, 1948.

By its original order of April 7, 1948, the Commission uthorized the project upon the express condition, among thers, that the construction of the new lines of railroad e commenced on or before December 31, 1948, and com-leted on or before December 31, 1953 (R. 42). By a ubsequent order of November 22, 1948, the Commission xtended the period of time for commencement and com-letion of the project to December 31, 1949, and December 1, 1954 (R. 51), respectively, upon representation by the arriers that they would need another year in which to ommence construction of the new terminal (R. 49), and pon a finding that applicants would be unable to com-nence or complete the authorized construction of the lines f railroad within the time prescribed by the original rder (R. 50-51).

The Commission's order of April 7, 1948, further directs that none of the lines or operations herein permitted to e abandoned may be abandoned until operation is sub-tituted over lines herein authorized to be constructed, ac-uired, or jointly used or owned." (R. 42). It is clear hat the overwhelming majority of the employees who ill be adversely affected by the project will not be so ffected until after the now existing trackage and the five eparate terminal stations are abandoned (R. 27), now

sometime in 1954. But the protective conditions by their terms expire in May 1952.

In the light of the foregoing undisputed facts, it was contended by the appellant that since, by applicants' own estimates, "physical consummation of the project will require four or five years,"[7] imposition of conditions limited in point of time to four years from the effective date of the Commission's order (i.e., May 17, 1952) would effectively nullify such conditions because the period of protection would expire before employees were adversely affected (R. 29).

Consequently it was argued that the purported protection would, in fact, amount to no protection under the circumstances of this case, and that such a result would be wholly contrary to both the terms and spirit of Section 5(2)(f) of the Interstate Commerce Act. Accordingly, it was submitted that the period of protection should date from the time when employees are adversely affected in order to provide some protection to employees in accordance with the basic purpose of the statutory provision when read as a whole (R. 30).

Although the Commission determined that it was appropriate to require a fair and equitable arrangement to protect the interests of all the railroad employees affected by the authorizations granted, it concluded that as a matter of law it had no authority to prescribe a period other than one of four years from the effective date of its order (R. 22).

A petition to the full Commission for reconsideration and modification of this conclusion by Division 4, on the ground that it represented an erroneous construction of the provisions of Section 5(2)(f), was denied (R. 51).

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[7] The Commission expressly so states in its report (R. 28). Now, however, the period for physical consummation is extended an additional year as a result of the authorized extension of time for commencement and completion of the project (R. 51).

Following denial of its petition for reconsideration to he full Commission, appellant filed a complaint in the 'nited States District Court for the District of Columbia, eeking to set aside that part of the Commission's order sserted to result from an erroneous construction of Sec- ion 5(2)(f) of the Interstate Commerce Act (R. 1). After nswer by the defendant (R. 53) and intervening defend- nts (R. 57, 60), all parties moved for summary judgment, here being no genuine issue of a material fact in dispute R. 65-68). For this reason, the evidence introduced be- ore the Commission was not proffered in evidence before he District Court. The single question presented for de- ermination was whether Section 5(2)(f) of the Interstate 'ommerce Act requires the Commission to limit all pro- ection of employees adversely affected to a period of four ears from the effective date of its order of approval R. 71).

The case was heard on May 6, 1949, before a three-judge ourt convened pursuant to the provisions of the revised udicial Code effective September 1, 1948, Title 28 United States Code, Sections 1336, 2325, and 2284.

On May 27, 1949, the District Court rendered its opin- on upholding the Commission's construction of the stat- te, and, having determined that there was no genuine ssue of a material fact (R. 69), granted defendants' notions for summary judgment and dismissed the com- plaint. The District Court's judgment and decree was ntered on June 17, 1949 (R. 72).

SPECIFICATION OF ERRORS

Appellant relies upon each of the errors enumerated n its Assignment of Errors (R. 75-77), and in particular rges that the District Court erred:

1. In holding and concluding that under Section 5(2)(f) f the Interstate Commerce Act the Interstate Commerce Commission has no authority to provide any other period

of protection than one of four years from the effective date of its order.

2. In failing to hold and conclude that although the Commission is required by the said Section 5(2)(f) to provide a period of protection of at least four years from the effective date of its order, it is not precluded by that section from providing a longer period if the facts and circumstances of a particular case require such longer period in order to provide a fair and equitable arrangement for the protection of employees.

3. In failing to hold and conclude that although the second sentence or provision of the said Section 5(2)(f) states a minimum protection both of type and extent in time which the Commission must provide, the section as a whole does not require the acceptance of said minimum provision as the maximum protection which may be authorized.

4. In construing the said Section 5(2)(f) in such manner as to bring about an inequitable, unreasonable, and unintended result contrary to the basic purpose and intent of Congress in providing the legislation.

SUMMARY OF ARGUMENT

I.

The issue in this case is solely one of construing the extent of the Commission's authority to provide protection for employees under Section 5(2)(f) of the Interstate Commerce Act. As interpreted by the Commission, the statute gives it no authority, regardless of the merits or its desires in a particular case, and under no conceivable state of evidence, to provide any other period of protection than one of four years from the effective date of its order. This is a time limitation which admittedly governs the specific requirements of the second sentence of Sec-

tion 5(2)(f), but which the Commission contends also governs its authority under the section as a whole.

The Commission's construction of the statute creates in this particular case a patently inequitable result which its language does not require, and which is repugnant to a common sense interpretation of Congressional intent. That inequitable situation is briefly this. It is undisputed that the overwhelming majority of employees who will be adversely affected by the approved transactions will not be so affected until after the period during which the conditions are applicable has expired. The protective conditions by their express terms expire in May, 1952, but the bulk of employee dismissals and displacements will not occur until after the completion of the project, which the Commission has found cannot be accomplished until sometime in 1954. For this reason, appellant requested that the period of protection date from the time of the adverse effects, which was the period provided by the Commission in *United States* v. *Lowden*, 308 U. S. 225.

The manifest purpose of Section 5(2)(f) was to provide railroad employees dismissed and displaced from their jobs as a result of carrier coordination transactions with a period of financial assistance, by way of compensatory allowances, during which to readjust themselves. The reason is readily apparent from a reading of this Court's decisions in *United States* v. *Lowden*, 308 U. S. 225 and *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373. There it was established that protection of the morale and welfare of the railroad employee was an acknowledged part of the public interest in maintaining an adequate and efficient transportation system. Since, as this Court held in the cited cases, this protection was available to the Commission to provide without express language to that effect, it was obviously not the purpose of Section 5(2)(f) to take it away. That section is interpreted here as requiring a decision which merely gives the great majority of em-

ployees "notice" that four or five years hence their jobs might be placed in jeopardy. Such a construction would destroy morale and welfare, not aid it.

We contend that the Commission's construction of the statute and that of the District Court are erroneous not only from the standpoint of accepted rules of statutory construction but also in the light of the legislative history of the statutory provisions in question.

II.

The language of Section 5(2)(f) clearly gives the Commission discretion to provide protection beyond the minimum requirements of its second sentence.

On its face, the first sentence of the section plainly vests discretion in the Commission to determine what will constitute fair and equitable protection. This provision makes mandatory a fair and equitable arrangement, but leaves to the Commission's discretion the nature and extent in time of the particular type of protection to be afforded.

The second sentence does not provide the standards for the first sentence as held by the District Court, but provides specific protection both of type and extent which the Commission is required to impose. The specific type of protection is that the employee shall not be in a "worse position" with respect to his employment, and the extent in time this type of protection is required is four years from the effective date of the Commission's order, with a proviso that a longer period shall not be required than the period during which the employee was in the service of the carrier prior to the effective date of the Commission's order. But the time limiting language of the proviso is carefully restricted to the second sentence alone and does not apply to the section as a whole.

We contend that the specific requirements of the second sentence, which include the only reference of the section

to a four year period, constitute *minimum* requirements below which the Commission may not go in providing the fair and equitable arrangement required by the first sentence but beyond which it is free to act if the circumstances of a particular case require a more extended period. To construe the section otherwise would make surplusage of the first sentence and violate the well established principle that a statute should be so construed that no clause, sentence, or word will be superfluous, void, or insignificant, and each part should be interpreted so as to make all provisions harmonize. *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755, 764; *Market Co.* v. *Hoffman*, 101 U. S. 112, 115-116; *Ex Parte Public Bank*, 278 U. S. 101, 104; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *Markham* v. *Cabell*, 326 U. S. 404, 409. As the Commission and the lower court interpret Section 5(2)(f) however, the second sentence nullifies the first because the Commission claims it has no discretion but to follow the specifications of the second provision alone.

The net effect of the Commission's construction is that Congress intended to guarantee the benefits of protective conditions to all railroad employees who would be adversely affected by projects which could be physically consummated during the period of four years from the Commission's order authorizing such projects, but that no protection whatsoever was to be accorded employees who would be adversely affected by projects which could not be physically consummated within such a period. Manifestly, Congress intended no such inequitable or incongruous result. *Cf. American Trucking Assn.* v. *United States*, 310 U. S. 534, 542; *Cabell* v. *Markham*, 148 F. 2d 737, 739 (C. C. A. 2d) aff'd 326 U. S. 404, 409.

III.

The legislative history of Section 5(2)(f) confirms the foregoing construction of the statute. The first and second sentences of the section had entirely different origins and

objectives, and when finally embodied within the statute, distinct meanings and purposes.

The first sentence was introduced with the objective of giving legislative assurance of a continuance of the type of protection provided by the Washington Job Protection Agreement, which the Commission had previously afforded under its discretionary powers. *United States* v. *Lowden*, 308 U. S. 225, 239; *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373, 379. That such was its minimum purpose is clearly evident from repeated statements by the legislative framers of the provision that its language sought not only to guarantee the protection gained by the Washington Agreement and approved by this Court in the *Lowden* case, but also to provide "the possibility of gaining further rights by collective bargaining or by action of the Interstate Commerce Commission."

The objective of the second sentence of Section 5(2)(f), known as the Harrington amendment, was entirely different. As originally introduced it sought to protect "the railroad worker against any unemployment or any impairment of employment rights"—the very adversity which the first sentence clearly contemplated would ensue as a natural result of coordination transactions, and which it sought to mitigate by providing a period of financial assistance within which the railroad employee could readjust himself. The violent opposition which this second provision encountered, unlike the first on which railroad management as well as railroad labor were united, finally resulted in a compromise provision which insured the employee from being placed in a "worse position" with respect to his employment, but limited the requirement of such type of protection to four years from the effective date of the Commission's order approving the transactions. At no time was this provision designed to subtract from or circumscribe benefits available under the first provision. On the contrary it was pointedly described as providing "further protection".

The men of Congress who actually drafted the final measure as it now appears in the Interstate Commerce Act described its provisions as stated above. The final conference report clearly indicates that the time limitations of the section apply only to the requirements of the second provision. After first discussing the first sentence as a separate provision which the conferees had retained, the report included the following explanation with respect to the retention of the requirements of the second sentence:

> ". . . The conference agreement, however, qualifies *this provision* by confining *its* operation to a period of four years from the effective date of the order approving the transaction . . ." (Italics supplied)

Finally, as if to remove all doubt of the continuance of Commission discretion beyond the specific requirements of the second sentence, Representative Lea, Chairman of the House conferees, in concluding his explanation of the intention of the conference committee to the House, stated:

> "We believe that is a very fair and a very liberal provision for labor. We believe that railway labor substantially agrees in that viewpoint. We take nothing from labor by this agreement. We simply write *specific provisions that shall be in the order* of approval of the Commission, *but otherwise we do not tie its hands.*" (Italics supplied.) [8]

The entire legislative history is devoid of a suggestion by anyone at any time that the type and extent in time of protection which the carriers and labor had voluntarily

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[8] *Cf. Railway Labor Executives' Association* v. *United States*, 38 F. Supp. 818, 823-824; aff'd 315 U. S. 373, where Chief Judge Groner observed:

> "These discussions [the legislative history of Section 5(2)(f)] resulted only in the enactment of a provision requiring a 'fair and equitable arrangement' to protect employees in consolidation cases *and other more specific provisions therefor.*" (Italics supplied.)

agreed to in the Washington Agreement, the continuance of which Congress had sought to insure by the statutory language of the first sentence, was to be limited or nullified by the specific requirements of the Harrington amendment which, as modified, is now embodied in the second sentence of Section 5(2)(f).

IV.

The District Court's conclusion that the Commission's construction of the statute is entitled to great weight is without merit. In the first place, in only one of the four Commission decisions relied upon by the lower court in support of this conclusion was the issue presented by this case raised or discussed. In that decision, *Chicago, Milwaukee, St. Paul & Pac. Ry. Co. Trustees et al. Construction*, 257 I. C. C. 292, three Commissioners dissented. In the second place, it was established by this Court in *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373, 380, that the Commission's construction of a statute under circumstances such as are present in this case is not entitled to great weight.

V.

The Commission's construction of Section 5(2)(f) in this case is directly contrary to interpretation of the intent of the statute in previous decisions of this Court. Here the Commission asserts it is powerless under mandatory provisions to provide protection which it did provide under its discretionary power prior to the enactment of Section 5(2)(f). This Court has already determined, however, that the purpose of Section 5(2)(f) was simply to make mandatory the protection for workers that had previously been discretionary. *United States* v. *Lowden*, 308 U. S. 225, 239; *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373, 379.

Moreover, the Commission undeniably possesses under the abandonment provisions of the Interstate Commerce Act authority to provide the very protection sought by appellant in this case and afforded by it in the *Lowden* case. *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373. Accordingly, the Commission's negation of authority under Section 5(2)(f) means that what was available in terms of protection when the Interstate Commerce Act contained no requirements for protective conditions is now denied by a statutory provision which makes the imposition of an equitable arrangement for the protection of employees mandatory. Clearly, Congress intended no such incongruous result or inconsistency of statutory policy.

ARGUMENT

I.

Analysis of Commission's Decision and Summary of Appellant's Position.

The Commission's decision in this case on the issue of employee protection is wholly one of construing the extent of its authority under Section 5(2)(f) of the Interstate Commerce Act.[9] The Commission makes no attempt to reach a decision on the merits of the controversy. In fact, as shown by the relation of the facts of the case in the Statement above, a fair reading of the Commission's report clearly indicates the existence of a patently inequitable situation about which the Commission asserts it is powerless under the statute to do anything. The narrowness of the issue thus presented was recognized by the court below when it said:

> "The issue here involved therefore concerns merely an interpretation of the provisions of Section 5(2)(f)

[9] 54 Stat. 906, 49 U. S. C. § 5(2)(f).

> of the Transportation Act. It does not involve the review of any discretion exercised by the Commission, as that body has held that 'the fair and equitable arrangement contemplated by Section 5(2)(f) is measured by the specification therein of a protective period of four years from the effective date of our order approving the transaction within the scope of Section 5(2)(f).' " [10]

In the light of the issue thus limited, the legal conclusion of the Commission affirmed by the court below is one of far reaching significance. It simply means that under no conceivable state of evidence in any case involving a coordination or consolidation transaction subject to approval under Section 5(2) of the Interstate Commerce Act can the Commission grant any protection to employees except that specifically required by the second sentence of Section 5(2)(f) of the Act. Such protection is limited in point of time to four years *from the effective date of the Commission's order of approval.*

The particular irony of this restricted construction of Section 5(2)(f), as will be developed in more detail later herein, is that it denies the existence of authority under mandatory provisions of the Act to provide protection, required by the circumstances of this case, which this Court has held the Commission clearly possessed when no such mandatory provisions existed in the Act,[11] and also which this Court has held the Commission possesses under the abandonment provisions of the Act,[12] where employee protection is discretionary but not required.[13] We feel that such a circumstance alone is a persuasive indication

[10] R. 71.

[11] *United States* v. *Lowden*, 308 U. S. 225, wherein the Commission imposed protective conditions extending in point of time for five years *from the date when the employee was adversely affected.*

[12] 49 U. S. C. § 1(18)-(20).

[13] *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373.

that Congress intended no such construction of the statute as has been made in this case.

Not only does the Commission's construction of the statute do violence to a common sense interpretation of Congressional intention, but it creates in this particular case an inequitable situation which the language of the statute does not require. That inequitable situation is briefly this. It is undisputed that the overwhelming majority of the employees who will be adversely affected by the approved transactions will not be so affected until after the period during which the conditions of protection are applicable has expired.[14] This is so because the conditions by their express terms expire in May, 1952, and the abandonments which give rise to the bulk of employee dismissals and displacements may not be instituted by the carriers until the new construction, acquisitions, etc., are accomplished (R. 42), which the Commission has found cannot be completed until sometime in 1954 (R. 50-51).

Aside from its asserted lack of statutory power, the Commission's sole answer to the inequitable result which will follow from its construction of the statute is its half-hearted suggestion that although "admittedly it is impossible at this time to determine the employees who will be released from service or otherwise affected adversely when the project is completed, . . . by comparison of seniority lists and the number of jobs affected, an employee could obtain some idea whether his employment would be placed in jeopardy, assuming no change in general conditions." (R. 30). The short answer to this suggestion is that even if true this is not the protection Congress sought to provide by Section 5(2)(f). As will become clear upon examination of the legislative history, *infra*,

[14] The railroad intervenors in their briefs before both the Commission and the District Court conceded that this was so by the statement: "It has been shown that the passenger terminal will not be ready for operation for four or five years and that only a few of the employees will be displaced or dismissed prior thereto."

Congress sought to give railroad employees legislative assurance that in the event of job dismissals and displacements due to coordination transactions, they would receive protection in the form of compensatory allowances in order that they might economically adjust themselves. This was the only type of protection which the Commission had afforded under its discretionary powers prior to the enactment of Section 5(2)(f), and it was this protection which Congress sought to continue by making it mandatory. *United States* v. *Lowden*, 308 U. S. 225, 239; *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373, 379. The reason is readily apparent from a reading of this Court's decisions in the cited cases. Protection of the morale and welfare of the railroad employee was an acknowledged part of the public interest in maintaining an adequate and efficient transportation system. Obviously, that morale and welfare is not served, nor was it ever intended by Congress to be served, merely by giving an employee "notice" that four or five years hence his job might be placed in jeopardy. Such a purpose would destroy morale and welfare, not aid it.

If there is any doubt that the purpose of the statute was to provide a system of compensatory allowances, when and if needed, it is resolved upon examination of the very conditions imposed by the Commission in this case (R. 43-48). They are applicable by their express terms if, and only if, an employee is displaced or dismissed from his employment as a result of coordination and abandonment transactions undertaken by the carriers.[15] Accordingly, their purpose can only be to provide employees with a period of financial assistance within which to adjust themselves to the economic calamity of job dismissals and displacements—a need which arises only upon actual impact of job loss or displacement. Since this is the only

[15] See the summary discussion of the nature of the conditions imposed, *supra* pages 6-7.

protection even purported to be provided by the Commission, it is idle to talk of protection in terms of notice.

Moreover, even if we accept, *arguendo*, the notion of "notice" over a four year period as protection for employes, as a practical matter there is no such notice in this case. There is no possible way for an employee now to determine whether four or five years hence his job will be in jeopardy. This is so, in part, because of deaths, retirements, resignations and the like which completely alter the seniority status of a man, which seniority fixes his rights to job entitlement at the time of layoffs and job changes. In part, it is also due to the fact that none of the present employees at the five separate terminals to be abandoned could conclude with any degree of certainty whether they or others would be recruited for employment by the new company upon completion of the passenger terminal. Until the new terminal is completed, the only indication these employees will have as to their future job status is that "so far as feasible" an estimated, but unidentifiable, number will be reemployed. It is readily apparent that such a qualification makes it quite impossible for an employee now to even estimate his chances of dismissal or retention. For example, certain of the employees with senior status might be unqualified to meet technological changes in the operation of the new terminal. More employees may be taken from one of the present terminals than from another. Such examples could be multiplied. Furthermore, it is foolhardy to presume no change in general conditions on the railroads over an extended period of five years. If an employee were to resign now to accept another job on the assumption that general conditions being the same he would probably be laid off five years hence, and any one of a number of factors changed the picture so that in fact he would not have been dismissed from employment, such employee would needlessly sacrifice valuable rights to retirement pensions as well as a good job. If, on the other hand, an

employee depending upon a stabilization for the next five years of general conditions as they now exist, concluded that his position of employment was secure, and general conditions in the railroad industry or in the New Orleans district deteriorated, such an employee would still be released with no protection of the sort Congress sought to provide by the provisions of Section 5(2)(f). Obviously, the suggestion that the Commission's order gives an employee four years notice is of no validity in this proceeding.

Consequently, the decision in this case is reduced to a simple conclusion of law that regardless of the lack of equity in the "protection" here afforded, the Commission has no authority under the statute to provide any other. The Commission so concludes in its report wherein, in speaking of the fair and equitable arrangement which it is directed by statute to require to protect the interests of all railroad employees adversely affected, it states (R. 32):

> "We think that the benefit of such an arrangement necessarily must extend to all the railroad employees affected by exercise of the authorizations herein granted. But we also think that the fair and equitable arrangement contemplated by section 5(2)(f) is measured by the specification therein of a protective period of 4 years from the effective date of our order approving a transaction within the scope of section 5(2). As was decided in *Chicago, M., St. P. & P. R. Co. Trustees Construction, supra*, we have no authority to prescribe any other period." [16]

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[16] In *Chicago, M. St. P. & P. R. Co. Trustees Construction*, 257 I. C. C. 292, the majority of the Commission (three Commissioners dissenting) held:

> "Section 5(2)(f) prescribed a definite period of protection, namely, 'four years from the effective date of such order'. In our opinion, we have no authority to prescribe any other period in a case arising under section 5(2)."

The Commission's decision in this case—the only other Commission decision involving the issue presented on this appeal—was not appealed to the courts, probably for the reason that the period of protection there, unlike in this case, would not wholly expire before the overwhelming majority of employees would be adversely affected.

The District Court agreed with the foregoing construction of the statute, and assigned the following three grounds as the basis of its decision (R. 71-72):

1) Section 5(2)(f) is clear and unambiguous in that the first sentence provides that the Commission shall require fair and equitable arrangements to protect the interests of employees affected; and the second sentence provides the standard for such arrangements, including a limitation of four years from the effective date of the approval order.
2) This interpretation is in accord with the Commission's prior construction of the statute,[17] and on that account is entitled to great weight.
3) The legislative history of Section 5(2)(f) set forth by counsel for the defendants in their briefs is corroborative of the Commission's interpretation of the statute.

It is our position that the Commission's construction of Section 5(2)(f) is erroneous, and that both the well accepted rules of statutory construction and the legislative history of the provisions in question clearly establish an intent by Congress contrary to that attributed by the Commission. It is our further position that each of the grounds advanced by the District Court in support of its decision are erroneous. It will be our purpose to develop the argument herein with specific reference to each of these grounds of decision.

II.

The Language of the Statute Clearly Gives the Commission Discretion to Provide Protection Beyond the Minimum Requirements of the Second Provision of Section 5 (2)(f).

For the convenience of the Court in following the argument to be advanced in this section, we repeat the

[17] Here the District Court relied upon four cases, only one of which we contend involved the issue here presented.

language of the first and second provisions of Section 5(2)(f):

> "As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order."

On its face, the first sentence of the section plainly vests discretion in the Commission to determine what will constitute fair and equitable protection for employees. This provision makes mandatory a fair and equitable arrangement for the protection of employee interests adversely affected, but leaves to the Commission's discretion the determination of the nature and extent in time of the particular type of protection to be afforded—unquestionably to be judged in the light of the circumstances of particular cases presented.

The second sentence of the section provides specific protection both of type and extent in time which the Commission is *required* by positive language to impose. The reason we say this language requires protection of a specific *type* is that it guarantees that an employee will be in no "worse position" with respect to his employment. Such protection is also limited in time to four years from the effective date of the Commission's order. But there is no language in this second sentence which purports to

nullify the language of the first sentence, under which the Commission certainly has discretion to provide a period of protection other than one of four years from the effective date of its order. For this reason we contend that the second sentence constitutes a *minimum standard* below which the Commission may not go in providing a fair and equitable arrangement for the protection of employees adversely affected, but beyond which it is free to act if the circumstances of a particular case require a more extended period.

We submit that this construction of the language of the second sentence is substantiated by the proviso of the second sentence which states:

> ". . . except that the protection afforded to any employee *pursuant to this sentence* shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order." (Italics supplied.) [18]

Congress did not say that the protection afforded by the *section* shall not be required to continue for more than the four year period. It used the qualifying words "pursuant to this sentence". This is a further indication that Congress was thinking in terms of a minimum requirement when it wrote the second sentence of the section, and that it did not intend to divest the Commission of all discretion under the section as a whole with respect to the extent in time of employee protection. If the intention of Congress in writing Section 5(2)(f) had been to limit all protection available thereunder to a period of four years from the effective date of the Commission's order, it could easily have said so in unmistakable terms. The fact that it did not do so, but carefully prescribed the limitation

[18] Unfortunately, the District Court omitted the qualifying language here italicized in its quotation of the statute (R. 70).

as applicable only to the positive requirements of the second sentence, is persuasive evidence that it intended the first sentence of the section to have meaning and purpose and not to be wholly circumscribed, as held by the District Court, by the provisions of the second sentence. Moreover, the extended legislative history of the origin and entirely distinct purposes of the first and second sentences of Section 5(2)(f), which will be discussed later herein, is convincing evidence that the restriction of the four year period to the second sentence rather than to the section as a whole was purposeful and not inadvertent.

As the Commission interprets the first and second provisions, however, the second nullifies the first because the Commission claims it has no discretion but to follow the specifications of the second provision alone. Unless we assume that Congress in enacting Section 5(2)(f) included the first provision thereof for no purpose, the construction urged by the Commission and the District Court in this case must be rejected. *Cf. Chicago, M., St. Paul & Pac. R. Co.* v. *Acme Fast Freight, Inc.*, 336 U. S. 465, 472; *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755, 764. Possibly no principle of statutory construction is better established than the cardinal rule that a statute ought to be so construed that, if possible, no clause, sentence or word shall be superfluous, void, or insignificant. The equally well established corollary rule is that every part of a statute must be construed in connection with the whole, so as to make all of the parts harmonize, and thus accord meaning to each. *Market Co.* v. *Hoffman*, 101 U. S. 112, 115-116; *Ex Parte Public Bank*, 278 U. S. 101, 104; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *Markham* v. *Cabell*, 326 U. S. 404, 409.

This rule of statutory construction requires that both provisions of Section 5(2)(f) be construed together in such manner as to give proper effect to each. If the second provision is construed as establishing the only protection available under the section, it is submitted that this

rule will be violated in that the first provision will in effect be read out of the statute. Accordingly, as noted above, since the second provision of the section is mandatory as to type of protection to be afforded, it undoubtedly was intended to state a minimum standard of employee protection. If it is construed as stating a maximum as well, then inasmuch as it would provide both maximum and minimum it would state the *only* protection which the Commission might impose and thus would completely do away with any reason for the presence of the first provision in the statute. *Cf. Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755, 764. Obviously this leads to an absurd and unreasonable result, and as will later be shown, one clearly at variance with the legislative intent and policy at the time Section 5(2)(f) was enacted. *Cf. American Trucking Association* v. *United States*, 310 U. S. 534, 542; *Markham* v. *Cabell*, 326 U. S. 404, 409.

The net effect of the Commission's construction is that Congress intended to guarantee the benefits of protective conditions to all railroad employees who would be adversely affected by projects which could be physically consummated during the period of four years from the Commission's order authorizing such projects, but that no protection whatever was to be accorded employees who would be adversely affected by projects which could not be physically consummated within such a period. Manifestly, Congress intended no such inequitable or incongruous result. The inequity wholly disappears if the first provision of Section 5(2)(f) is given the meaning its language purports to grant and if the second provision of the section is interpreted as establishing a minimum standard only. We see no other way in which both provisions of Section 5(2)(f) can be reasonably construed.[19]

[19] *Cf.* the reasoning of Judge Learned Hand in *Cabell* v. *Markham*, 148 F. 2d 737 at 739 (C. C. A. 2d), aff'd 326 U. S. 404.

III.

The Legislative History of Section 5(2)(f).

To a substantial extent the answer to this case appears to us to lie in a proper understanding of what objectives Congress sought to accomplish when it wrote the first and second sentences of Section 5(2)(f). Each of these provisions had a different origin and purpose, and we believe a complete appreciation of the history of the provisions will contribute materially to the problem of statutory construction now before the Court. In thus seeking to aid the problem of construction through resort to legislative history, we can offer no better supporting reason than that provided by Judge Learned Hand in *Cabell* v. *Markham* [20] where he observed:

> "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. . ."

This is not a case where such a discovery of Congressional purpose can be made by mere reference to statements in conference reports or quotation of congressional comment isolated from the background of the controversy. On the contrary, the true intent of the language which resulted can only be understood against the backdrop of the intense struggle which characterized its passage—a struggle in which two forces of railway labor, with entirely different aims and objectives, finally each saw their objectives enacted into law. For this reason the history of this piece of legislation was exceedingly protracted in the light of the brief section which finally emerged.

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[20] 148 F. 2d 737, 739 (C. C. A. 2d), aff'd 326 U. S. 404, 409.

We intend to show several things by this review of the legislative history. We will show that what is now the first sentence of Section 5(2)(f) was originally intended as the sole provision to be inserted in the act for the protection of employees adversely affected by consolidation transactions; that this provision was regarded as completely satisfactory by the great majority of railway labor and by all of railroad management, and was envisioned as statutory insurance of at least a continuance of the principles of the Washington Job Protection Agreement of 1936—a private agreement existing between approximately 85% of the railroads of the country and 20 of the 22 railroad brotherhoods; that this provision, without more, was recommended by the so-called Committee of Six, was passed by the Senate, and was reported favorably to the House by the House Interstate Commerce Committee; and that when it was finally embodied into Section 5(2)(f) as the first provision thereof, it had a well settled meaning, purpose and scope and was clearly regarded by the Congress as a provision under which the Commission could continue to exercise its discretion to either grant protection along the lines of the Washington Agreement or improve upon that protection, after first satisfying the specific requirements of the second provision of the section.

We shall also show that the original proposal of what is now the second sentence of Section 5(2)(f), the so-called Harrington amendment, was designed, completely unlike the first provision of the section, to require that employees would neither be deprived of employment nor have their employment status impaired as a result of transactions approved under Section 5(2) of the act: that under successive modifications by the House of Representatives and Congressional conference committees, this original objective was limited in scope and time as it now appears in the second sentence of the statute; and that notwithstanding the modifications, its proponents regarded the provi-

sion as a measure of victory toward a totally different objective than that advanced by the proponents of the first provision of the section. We shall further show that at all times in the consideration of Section 5(2)(f) the provisions which follow the first sentence of that section were designed and regarded as minimum requirements, and that they were never intended to subtract from or restrict the operation of the first provision.

Finally, we shall show that the section as a whole was carefully explained by members of the Conference Committee which drafted the final measure as one which guaranteed certain minimum protection but which also intended that the Commission should be free to impose such further protection as in its discretion was considered necessary to provide "a fair and equitable arrangement."

A. *Background of the Legislation*

The situation which gave rise to the Transportation Act of 1940 was briefly this. The financial condition of the railroads had evoked considerable concern over a period beginning about 1929. Early in 1938, the President appointed three members of the Interstate Commerce Commission, referred to as the Committee of Three, to bring in recommendations "relating to this serious situation".[21] On September 20, 1938, the President appointed another special committee, this one known as the "Committee of Six", the membership of which was equally divided between management and labor,[22] and directed them "to con-

[21] H. R. Doc. No. 583, 75th Cong., 3d Sess., p. 1.

[22] The Committee of Six was composed of Mr. M. W. Clement, President, Pennsylvania Railroad; Mr. E. E. Norris, President, Southern Railway; Mr. C. R. Gray, Vice Chairman, Union Pacific Railroad; Mr. George M. Harrison, Grand President of the Brotherhood of Railway and Steamship Clerks, and Chairman of the Railway Labor Executives' Association; Mr. B. M. Jewell, President of the Railway Employes' Department of the American Federation of Labor; and Mr. D. B. Robertson, President, Brotherhood of Locomotive Firemen and Enginemen. (Hearings on Transportation Act of 1939, Senate, pp. 4-5)

sider the transportation problem and recommend legislation."[23] Of significance to our problem here was their recommendation with respect to proposed changes in the consolidation sections of the Interstate Commerce Act that there be "a fair and equitable arrangement to protect the interest of the . . . employee".[24]

The equal division of membership of the Committee of Six between railroad management and railroad labor is significant for the purpose of our present inquiry. These men, all leaders in their field, were assembled to cooperate in an effort to benefit the industry upon which both wings of the Committee depended for their support. It is of importance to note that they were not there to adjust controversies between themselves. Their purpose was rather to formulate a plan for the rehabilitation of the railroad industry, a plan from which all elements involving controversies between labor and management would be eliminated in order that both parties might give it unreserved support.

Accordingly, no controverted question of labor relations was considered by the Committee. In its report to the President, the Committee stated:

> "Your committee has carefully considered many suggestions and recommendations which have come to us from various sources. We have also considered proposals advocated by railway management and the labor organizations having to do with labor relations, but laid them aside believing that they are in the main problems to be worked out to the extent possible in joint conference by these interests through collective bargaining, and if no solution can be found they may

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[23] Report of the Committee to the President, dated December 23, 1938, p. 1. The Report is reprinted on pp. 257-308 of *Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Sess., on H. R. 2531 and H. R. 4862.*

[24] *Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Sess., on H. R. 2531 and H. R. 4862*, p. 275.

be urged upon the government or otherwise handled as the circumstances may appear to warrant." [25]

Also pertinent to the same effect is the testimony of Mr. George Harrison, at that time President of the Railway Labor Executives' Association, and one of the members of the Committee of Six, before the House Committee:

> "The railroads wanted to talk with us about amending the Railway Labor Act. We wanted to talk with them about a 6-hour day and we realized that if the members of the committee got to discussing, quarreling about those matters we would forget the job we were assigned to do and that job was to do something about the transportation industry." [26]

As far as the general question of consolidations was concerned, there was at that time no controversy either in or outside the Committee of Six. The Interstate Commerce Commission had flatly stated that elimination of the provisions of the Transportation Act of 1920 requiring the Commission to direct the consolidation of railroads into a prearranged limited number of systems was one of the primary purposes of the bill.[27] This plan had proved a failure and it was the consensus of opinion in the Committee of Six that it should be abandoned.

It was conceded, however, on all sides that economies could be brought about through consolidations of rail carriers voluntarily proposed. It was further conceded that *these economies would be realized principally at the expense of railroad labor.* At first glance, this would appear to present one of those controversial questions of labor relations which the Committee of Six desired to avoid. Such, however, was not the case because the potential conflict of interests between the parties had already been adjusted through the execution of the Washington Job Pro-

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[25] *Id.* at p. 277.

[26] *Id.* at p. 227.

[27] *Id.* at p. 31.

tection Agreement in May 1936.[28] This Agreement provided in essence for a system of allowances payable over a stated period to employees adversely affected by railroad consolidations, *with the protection dating from the time of the adverse effect.*

Accordingly, there was no controversy between the members of the Committee of Six as to the question of the protection of employees in consolidation cases, and the Committee could recommend, as it did, that in passing upon a carrier's application for leave to effect a consolidation, the tribunal having jurisdiction: "shall examine into probable results of the proposed consolidation and require as a prerequisite to its approval a fair and equitable arrangement to protect the interests of the . . . employee."[29]

It must be remembered that when the Committee made this recommendation, it merely advocated the doing of what the employee organizations and 85% of the railroads had already done through the Washington Agreement. That the above is an accurate appraisal of the reasons which actuated the Committee is revealed in the testimony of Mr. Harrison when he stated:

> "Now, the existing situation is this: In 1936 in the Spring of that year, we made an agreement with about 85 per cent of the mileage of the country providing a schedule of benefits for workers that might be affected by consolidations or mergers. That agreement has now been in operation for about three years and it has worked out very satisfactorily. It does

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[28] This Agreement was entered into by approximately 85% of the railroads of the United States and 20 railroad brotherhoods and covered provisions for the protection of employees adversely affected by unification, consolidation, merger and pooling transactions. Its provisions are summarized in the volume of House Hearings at page 241. The Agreement is printed in its entirety beginning at page 231 of these Hearings, cited *supra*, note 24.

[29] *Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Sess., on H. R. 2531 and H. R. 4862*, p. 275.

not provide as much protection as the workers would like to have; but that is a matter that we undoubtedly can work out with the employers, since they now accept the principle that the men are entitled to protection.

"Well, you might very properly ask the question, If we have such an agreement why we want to put anything in the law? Well, the reason for it is that about 15 per cent of the mileage of the country refuses to come into the agreement. You always have the willful minority that will not go along with the general good and so you have got to make those people do what is right, assuming that what has been done is right, and so we propose that this Transportation Board be given the authority to impose and require protection for men who are adversely affected when these changes are made." [30]

B. *Senate Proceedings*

Pursuant to the recommendations of the Committee of Six, Senators Wheeler and Truman, on March 30, 1939, introduced a bill, S. 2009, concerning which Senator Wheeler stated:

"We did take the recommendations of the Committee of Six, and we used them as a basis for much that is contained in the pending bill, . . ." [31]

Section 49 of the bill dealt with the subject of unifications, consolidations, etc., and provided that, among other things, [Sec. 49(3)(c)]:

"The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected." [32]

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[30] *Id.* at pp. 216-217.

[31] 84 Cong. Rec., Part 6, 76th Cong., 1st Sess., p. 6136.

[32] This language is almost identical with the recommendation of the Committee of Six, *supra*.

Hearings commenced before the Senate Committee on Interstate Commerce on April 3, 1939. On that day Mr. Harrison testified and stated that if it became necessary or desirable to have unifications or consolidations with resulting displacement of men a reasonable adjustment such as labor then had with management [33] would "in the main" protect labor. His testimony is of importance to the inquiry here because it demonstrates that the statutory proposal of the Committee of Six for the protection of labor, which is now the first sentence of Section 5(2)(f), was intended to preserve the Commission's discretion to apply the principles of the Washington Agreement.

Mr. Harrison said:

> "Now, we realize that to the extent there are unifications made and the extent that they can be shown to be in the public interest, railroad labor will be adversely affected so we say that the Interstate Commerce Commission shall have the authority and that is in the report to provide for reasonable provisions for the protection of labor. The Commission now has that authority, but it is disputed by the railroads. The Committee of Six agrees that labor shall be protected in those measures authorized by the Commission.
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> "In the report of the Committee of Six *we do not undertake to lay down the specific, detailed protection that should be accorded labor by the Commission, but we were very much of the opinion that in prescribing the protection the Commission would undoubtedly follow what seems to be generally the practice; and that is represented in an agreement that now exists between substantially all of the employees' labor unions.* It provides a schedule of benefits and protections.
>
> "So to that extent I think the interest of labor will be protected, the public interest will be protected, and the oportunity to eliminate some bad situations

[33] The adjustment referred to was the Washington Job Protection Agreement.

in the railroad transportation machine will be available." [34] (Italics supplied.)

The hearings before the Senate Committee were concluded on April 14, 1939. On May 16, 1939, the Committee submitted its report to the Senate explaining therein the changes made and the unification and consolidation provisions of the bill. The report states that among the important changes accomplished by Section 49 of the bill was a provision:

> ". . . that the Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of Section 49, a fair and equitable arrangement to protect the interests of the employees affected.
>
> "The provisions referred to immediately above were included pursuant to the recommendations of the report of the Committee of Six (p. 30). There are no similar provisions in existing law." [35]

The bill was debated on the floor of the Senate from May 22nd to May 25, 1939, when it passed by a vote of 70-6.[36] Section 49(3)(c) of the bill was left unaltered and represents what is today the first sentence of Section 5(2)(f) of the Interstate Commerce Act.

C. *House Proceedings*

In March 1939, Chairman Lea introduced a bill (H.R. 4862) which was similar to S. 2009 with respect to the consolidation provisions. Previously in January, Chairman Lea had introduced H.R. 2531 dealing in general with the same subject matter as H.R. 4862. With respect to consolidations, mergers, etc., H.R. 2531 authorized the Commission to approve the proposed consolidation transac-

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[34] *Hearings before the Committee of Interstate Commerce, U. S. Senate, 76th Cong., 1st Sess., on S. 1310, S. 2016, S. 1869, and S. 2009*, p. 34.

[35] Sen. Rep. No. 433, 76th Cong., 1st Sess., pp. 28-29.

[36] 84 Cong. Rec., Part 6, 76th Cong., 1st Sess., p. 6158.

tion "subject to such terms and conditions and modifications as it shall find to be just and reasonable", and if it "will promote the public interest".[37]

The House hearings on the bills were conducted from January 24, 1939, to March 30, 1939. At these hearings, Mr. Gray, one of the management members of the Committee of Six, said there was no disagreement whatever about protecting employees displaced by consolidations and mergers, and that they had "a basis for compensation for men who are displaced and men who are disadvantaged by a consolidation or coordination".[38]

Mr. Harrison told the House Committee that it was in the public interest to protect the rights and interests of the employees who may be adversely affected by consolidations.[39] He spoke of the provisions of the Washington Agreement, then in force three years, and which "has worked out very satisfactorily"[40] and added: "It does not provide as much protection as the workers would like to have; but that is a matter that we undoubtedly can work out with the employers, since they now accept the principle that the men are entitled to protection."[41]

In short, the testimony of Mr. Gray and Mr. Harrison means that the carriers and labor had in good faith entered into the Washington Agreement, which extended protective conditions to displaced employees for a period of five years *from the date that the adverse effects oc-*

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[37] This language was substantially the language of Section 5(4) of the then existing act, and was utilized by the Commission prior to the Transportation Act of 1940 in affording protective conditions for employees adversely affected by consolidation transactions. *United States* v. *Lowden*, 308 U. S. 225.

[38] *Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Sess., on H. R. 2531 and H. R. 4862*, pp. 184, 193-194.

[39] *Id.* at p. 214.

[40] *Id.* at p. 260.

[41] *Ibid.*

curred. This agreement had been applied by the Commission in the *Lowden* case, and it was the sense of the Committee of Six that the proposed employee provision would insure adequate protection for labor by making mandatory a fair and equitable arrangement by the Commission but leaving as discretionary the exact nature of the protection to be afforded. By incorporating this language into the statute, Congress adopted the attitude of the Committee, i.e., that here was a non-controversial matter germane to the purposes of the statute which should be included without further debate.

On July 18, 1939, the House Committee reported its own bill by striking everything in S. 2009 after the enacting clause. Instead of codifying the act, as in the Senate bill, the House bill amended certain existing provisions of law and added a part III dealing with water carriers. With respect to the employee provision of the consolidation section, the House adopted the identical language of the Senate bill by requiring as a prerequisite to Commission approval of any proposed transaction under the consolidation section "a fair and equitable arrangement to protect the interests of the employees affected."[42]

The bill thus reported was debated in the House beginning July 21, 1939.

Harrington Amendment

On July 24, Mr. Harrington of Iowa suggested an amendment as follows:

> "Provided however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees."[43]

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[42] Explained in H. R. Rep. No. 1217, 76th Cong., 1st Sess., p. 12.

[43] 84 Cong. Rec., Part 9, 76th Cong., 1st Sess., pp. 9881-9882.

Mr. Harrington explained his amendment as protecting "the railroad worker against *any unemployment* or *any impairment of employment rights* as a result of consolidations."[44] (Italics supplied.)

Two things are immediately apparent upon consideration of this proposed amendment. First, it had an entirely different objective than the provision for employee protection passed by the Senate and recommended by the House Committee (now the first sentence of Section 5(2)(f)) since it sought to permanently prohibit the displacement of employees as a result of consolidations rather than to afford them dismissal and displacement allowances along the lines of the Washington Agreement, wherein adverse effect is a necessary prerequisite to the operation of the Agreement. Second, it very definitely sought to *add* to the proposal advocated by the Committee of Six as the measure of protection considered as reasonable by that Committee as well as by the Senate and House Committees. Had the amendment as originally proposed been adopted as a part of the finally enacted statute, consolidations might have been effected thereunder, but it would have been necessary to keep all employees of the consolidating carriers on the pay roll until such time as the normal attrition of the force reduced the number to the level needed for a permanent working force, and further would have required that there be no displacement from one position of employment to a position of less compensation.[45]

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[44] *Id.* at p. 9883.

[45] Such a proposal was not without precedent. In the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 49 U. S. C. § 250 et seq. (commonly referred to as the Coordinator's Act), which expired on June 17, 1936, Congress had included just such a provision as the original Harrington amendment sought to provide. By Section 7(b) it was provided that no employee was to be deprived of employment or be in a worse position with respect to his job by reason of any action taken pursuant to the authority conferred by this Act.

The Harrington amendment was adopted by the House and the bill passed on July 26, 1939. On July 29, the bill was sent to conference.

Regardless of the merits or demerits of the Harrington proposal, it is clear that it encountered widespread opposition. While the bill was in conference, the Legislative Committee of the Interstate Commerce Commission sent a special communication to Congress condemning the principle of the Harrington amendment in the following language:

> "As for the proviso, the object of unifications is to save expense, usually by the saving of labor. *Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington agreement, of 1936* between the railroad managements and labor organizations. *The proviso, by prohibiting any displacement of employees,* goes much too far, and in the long run will do more harm than good to the employees. In these days of intense competition from other forms of transportation, the railroads must, if they are to thrive and grow, conduct their operations with the utmost economy and efficiency. If they are prevented from doing this, further shrinkage of operations and continuing loss of employment are inevitable." [46] (Italics supplied.)

D. *1st Conference Report*

On April 26, 1940, the Conference Committee reported out S. 2009 with all changes made by the Senate and House in the consolidation provisions of Section 5 completely eliminated. With respect to the elimination of all mandatory employee protection from the bill, the Conference Committee made the observation that "the elimination of the consolidation provision from the bill obviates the necessity of guarding against the possible unemployment that might have otherwise resulted from these provisions." [47]

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[46] I. C. C. Report of January 29, 1940, p. 67.

[47] H. R. Rep. No. 2016, 76th Cong., 3d Sess., p. 61.

The reason for this observation bears explanation. In the debate on the floor of the House it was established that the House conferees felt they were following the desires of the sponsors of the Harrington amendment in eliminating consolidation features of the bill, and that they believed such elimination would be a satisfactory substitute for the Harrington amendment as originally proposed.

Mr. Wolverton, one of the conferee managers on the part of the House, concisely relates the history of the legislation leading up to the elimination of the consolidation section as follows:[48]

> "I will first direct your attention to the consolidation provisions of the bill, which included the Harrington amendment. The Senate bill did not contain the latter amendment *nor any provision that approached it in similarity.* Thus it was directly in dispute between the two Houses. After long and careful consideration of the matter by the conferees, it was decided that the best possible manner to deal with the controversial amendment was to strike out all reference to consolidations, mergers, and so forth, in the bill, and thereby remove the cause of the fear of wholesale dismissals that the Harrington amendment sought to protect railroad employees against.
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> "Both the original House and the Senate bills, as reported by the respective committees, contained provisions which were thought to be sufficient to protect employees from dismissal. Each of the bills clearly and explicitly laid a duty upon the Interstate Commerce Commission to protect the employees by the following provision:
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> 'The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interest of the employees affected.'
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> "This provision was suggested by the committee of six appointed by the President, consisting of three representatives of railroad management and three

[48] 86 Cong. Rec., Part 6, 76th Cong., 3d Sess., pp. 5878-5881.

representatives of the railroad brotherhoods. The Committees adopted the language suggested by them. In doing so we thought we had provided reasonable safety and security for railroad employees against unwarranted dismissals resulting from railroad consolidation. In this view we had the unqualified support of 20 of the 21 railroad brotherhoods. They represented 92% of railroad labor. The Brotherhood of Railroad Trainmen, during the committee hearings, requested that all reference to consolidations be left out of the bill and that the law be permitted to remain as it was under the existing consolidation law and as it is now in the Interstate Commerce Act. This Brotherhood was evidently of the opinion that the rights of labor in case of consolidations, mergers, and so forth, was protected by the terms of the so-called Washington agreement that had been entered into by all of the 21 railroad brotherhoods with the management of most of the railroads of the country. This agreement was then and still is in force without any action by Congress. Believing that we were justified in accepting the viewpoint of 92% of railroad labor, we reported the bill to the House with the consolidation provisions and with the language *that would guarantee to railroad labor the continuance of the protection gained by the Washington agreement* and also the possibility of gaining *further rights* by collective bargaining *or by action of the Interstate Commerce Commission.*

"When the bill came to the floor of this House an amendment to the consolidation section was offered by the gentleman from Iowa [Mr. Harrington]. This amendment was offered at the suggestion of the Brotherhood of Railroad Trainmen, which had requested at the committee hearings the elimination of the entire consolidation section. At no time, either in the Senate or House hearings, had any such amendment as the Harrington amendment been offered or advocated by that or any other brotherhood. The most that the Brotherhood of Railroad Trainmen had ever suggested was that the old section be removed. And yet, now that the conferees have done what they had requested, they come before the House through their spokesman and object to what we have done.

• • • •

"For some unaccountable and unexplained reason, a few of the railroad brotherhoods, notwithstanding their previous declarations of satisfaction with the action of the conferees, with reference to the consolidation features of the bill, have now withdrawn their support from S. 2009 and seek to have the bill recommitted. I confess to you, after nearly 14 years of service in this House, this action by these national representatives of the brotherhoods to which I refer is the most unusual action of labor representatives that I have ever experienced. I have sought the reason. No one has yet explained.

• • • •

"More than 76% of railroad labor has repudiated the viewpoint of those who seek recommitment and are actively supporting the bill.

[Herein follows a statement against recommittal by 15 or the 22 railroad brotherhoods representing approximately 850,000 employees.]

"Before closing my remarks on the subject of railroad employment, I wish to bring to your attention and emphasize the fact that the conferees have done nothing in this bill that directly or indirectly will harm, disturb or deal unjuslty with railroad labor. . . .

• • • •

"There is no justification for any member of this House interested in railroad workers to vote against S. 2009." (Italics supplied.)

The House of Representatives, however, refused to accept S. 2009 as reported out of the Conference Committee. After vigorous debate, the bill was recommitted with instructions, among others, that the Harrington amendment be insisted upon by the House conferees. However, the original Harrington amendment was modified in the instruction to recommit to provide that the Interstate Commerce Commission include in any order authorizing the consummation of transactions under Section 5:

". . . terms and conditions providing that such transaction will not result in employees of said carrier

being in a worse position with respect to their employment." [49]

The original employee provision of S. 2009, as it passed the Senate and was reported out of the House Interstate Commerce Committee, was also amended in the motion to recommit to read as follows:

> "(f) As a prerequisite to its approval of any consolidation, merger, purchase, lease, operating contract, or acquisition of contral, or any contract, agreement, or combination mentioned in this section, in respect to carriers by railroad subject to the provisions of part 1, and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." [50]

In other words, the modified Harrington amendment sought to add to the list of transactions subject to employee protection "the substitution and use of another means of transportation for rail transportation proposed to be abandoned". Moreover, the provision still contemplated the absolute maintenance of employment at the same level as before the transaction in question until normal attrition should reduce the force. This later provision was thus the same proposal to which the Senate Committee, the Conference Committee, and the Interstate Commerce Commission had already onjected.

In explaining the reasons for the modified Harrington amendment, Mr. Harrington on May 9, 1940, stated on the floor of the House:

> "Mr. Speaker, when I offered my amendment last July, I did so because there was no protection in the bill for the employees in the event of consolidation, *nor is there adequate protection for them in the pres-*

[49] 86 Cong. Rec., Part 6, 76th Cong., 3d Sess., p. 5886.

[50] *Ibid.*

ent law, and it is for this reason, and this reason only, that I believe you should vote to recommit the bill, with instructions to the managers on the part of the House that they insist that the modified language for labor protection be placed in the bill together with the change in the present law which will contain the consolidations sections requested by the railroads.

"There is not a railroad organization within the country which does not believe they should have *further protection* and those who have asked you to vote against recommitment are only doing so because they too have been mislead into believing that recommitment will kill the bill." [51] (Italics supplied.)

On May 9, 1940, the House by a vote of 209 to 182 adopted Mr. Wadsworth's motion to recommit directing its conferees to include, among other things, the revised Harrington amendment.[52]

E. *2nd Conference Report*

Again the matter was considered by the conferees, and on August 7, 1940, a second conference report was submitted to the respective houses.[53] The provisions for labor protection read as follows:

"Section 5(2)(f). As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee

[51] 86 Cong. Rec., Part 6, 76th Cong., 3d Sess., p. 5869.

[52] *Id.* at p. 5886.

[53] H. R. Rep. No. 2832, 76th Cong., 3d Sess.

pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

This is the present language of the Act.

The conference report explains the reasons for further modification of the Harrington amendment as follows:

"The House amendment included a proviso (the Harrington amendment) *prohibiting approval of any transaction which would result in unemployment or displacement of employees, or in the impairment of their employment rights. There was no similar provision in the Senate bill.*

* * * *

"The substitute proposal for the Harrington amendment, as recommended to the conferees by instruction of the House, provided in substance that in case of consolidations and other unifications involving carriers by railroads, the Commission should in its order of approval require fair and equitable arrangements to protect the interests of the railroad employees affected. *This provision* has been retained in the substitute agreement agreed upon in conference.

"The instruction of the House also made the provisions of the amendment applicable to the case where another means of transportation was substituted for rail transportation proposed to be abandoned. This provision is omitted from the substitute adopted in conference. A consideration of the application of this provision was, in the judgment of the conferees, found to be impracticable of proper administration.

"The conference agreement on the Harrington amendment includes a provision of the instruction which provides that the order of approval shall include terms and conditions providing that the transaction shall not result in the employees being in a

worse position with respect to their employment. The conference agreement, however, qualifies *this provision* by confining *its* operation to a period of four years from the effective date of the order approving the transaction and providing further that the protection afforded to an employee shall not be required to continue for a longer period following the effective date of the order than the period for which such employee was in the employ of an affected carrier prior to the effective date of the order.

"In other words, the Harrington amendment made all employees of the affected carriers equal beneficiaries of its provisions regardless of the length of time they may have been employed prior to a consolidation. It also required the carrier to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. Under the terms of the conference agreement, the benefits to employees will be required to be paid for not longer than four years after the consolidation, and in no case for longer than the service of the employee for the affected carriers prior to the effective date of the order authorizing the consolidation."[34] (Italics supplied.)

It is clear from the explanation by the Conference Committee of the Section 5(2)(f) that in the minds of the conferees the first and second sentences were regarded as separate provisions with different objectives. The first sentence was designed to require a fair and equitable arrangement by the Commission for the protection of employees affected by transactions authorized under Section 5. It was mandatory only in that sense. It was discretionary in the sense that the nature and extent in time of the protection to be afforded was for the Commission to decide. No limitation in point of the type of protection or in point of time is suggested. This is clarified by reference to the previous statement of Representative Wolverton, one of the House conferees, when he explained the provision as designed to "guarantee to railroad labor the continuance

[34] H. R. Rep. No. 2932, 76th Cong., 3d Sess., pp. 68-69.

of the protection gained by the Washington agreement and also the possibility of gaining *further rights* by collective bargaining or *by action of the Interstate Commerce Commission.*" (Italics supplied.)[55] Thus, the possibility of further rights "by action of the Interstate Commerce Commission", even beyond the protective conditions of the Washington Agreement, was always contemplated by the first sentence of Section 5(2)(f), and its retention in the section as finally enacted can only be explained as intended to confer such authority on the Commission. Otherwise, the provision would be pure surplusage. In *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755, this Court observed (p. 764):

> "In the present case, the legislative history confirms what a natural reading of the language of the agricultural exemption would indicate—the word production was not there used in the artificial and special sense in which it was defined in §3(j). Certainly, if it were meant in that sense, it would make surplusage of the remainder of the carefully wrought definition. . . ."

On the other hand, the second sentence deals with a specific type of protection expressly stated by the conference report to be a separate provision. Its imposition is required but the requirement is limited in point of time to four years from the effective date of the Commission's order. It is of the utmost significance to our problem here that in speaking of the four year period the conference report *expressly limits is applicability to the requirements of the second sentence only.*[56] To that extent it represents a minimum measure of protection below which the Commission cannot go in following the direction of

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[55] *Supra*, p. 42.

[56] The pertinent language referred to is "The conference agreement, however, qualifies *this provision* by confining *its* operation to a period of four years from the effective date of the order approving the transaction . . ." (Italics supplied). See full statement quoted *supra*, pp. 46-47.

the statute in the first sentence of Section 5(2)(f). But it most decidedly was never intended by Congress to "tie the Commission's hands" in providing additional protection or a more equitable arrangement under the first provision, and was never regarded as cutting down protection theretofore granted by the Commission, as in the *Lowden* case.

The debate on the floor of the House, particularly certain statements made by House members of the Conference Committee, provides additional support for these conclusions. In explaining the several provisions of Section 5(2)(f) to the House before the legislation was voted upon and adopted, Representative Lea, Chairman of the House Conferees, stated: [57]

> "The next amendment concerning which the House instructed us was known as the Harrington Amendment. There were certain things involved in the instructions as to this amendment to which I want to call your attention. The first was that the Interstate Commerce Commission should make fair and equitable provisions for employees affected adversely by reason of consolidations or unifications. We had a provision in the original bill that came to the House to that effect and the amendment that we have agreed upon embodies that same provision.
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> "The substitute that we bring in here provides *two additional things.* First, there is a limitation on the operation *of the Harrington amendment* for 4 years from the effective date of the order of the Commission approving the consolidation. In other words, the employees have the protection *against unemployment* for 4 years, but the Commission is not *required* to give them benefits for any longer period. . . .
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> "We believe that is a very fair and a very liberal provision for labor. We believe that railway labor

[57] 86 Cong. Rec., Part 9, 76th Cong., 3d Sess., p. 10178.

substantially agrees in that viewpoint. We take nothing from labor by this agreement. We simply write *specific provisions that shall be in the order* of approval of the Commission, *but otherwise we do not tie its hands.*" (Italics supplied.)

It seems perfectly clear to us from the foregoing statement that Congress intended to preserve the Commission's discretion to provide further employee protection beyond the specific requirements of the second provision.

Identically the same views as to the intent and full force of the first provision of the section were expressed by Representative Wolverton, another of the members of the committee which drafted the language of the section:[58]

"Now, as to the Harrington amendment, the conferees have adopted practically the same language as originally adopted by the House, but with a modification as to the length of time the provisions are to be effective. *This amendment, as you are all possibly aware, was not in the Senate bill in any form whatsoever.* Objection was made that the amendment, in the language adopted by the House, would *guarantee* for life the employment of any and all employees of railroads participating in a consolidation or merger of their lines even though the employee's service may have been as little as a month, or even less; and, furthermore, if there was no work for them as a result of the consolidation or merger, yet their compensation would continue upon the same basis as at the time of consolidation and until death or their voluntary separation from the service of the company.

"In fact there were some who were of the opinion that it froze every job for the employee in service at the time of consolidation but also froze perpetually every job which existed at the time of the consolidation or merger. So, even death or resignation of the employee did not end the job. It would descend to someone else even though not in the employ of the railroad at the time of the consolidation or merger.

[58] *Id.* at p. 10189.

And, then there was also further uncertainty in the opinion of some representatives of railroad labor as to whether the language of the amendment might not preclude voluntary agreements, between management and men by collective bargaining, from being entered into.

"I want, however, to make it clear that no one who expressed the opinions I have mentioned thought for a moment that any of these possibilities were ever intended by the sponsors of the amendment. It was recognized that the real intent of the sponsors was to save railroad employees from being suddenly thrust out of employment as the result of any consolidation or merger entered into. The Committee on Interstate and Foreign Commerce of this House in presenting its original bill used language which it thought accomplished that purpose. *We thought we were giving legislative assurance of at least a continuance of the Washington agreement* which had been previously entered into by the railroads and the 21 railroad brotherhoods. This agreement had furthermore been recognized and accepted by the Interstate Commerce Commission as a condition precedent for its approval in the Rock Island case, *United States* v. *Lowden* (308 U. S. 225), and this action of the Commission has been affirmed by the Supreme Court of the United States in a suit attacking its validity. *We thought that the language we had used not only established this agreement for all succeeding cases of consolidation or merger but that the language used would not preclude the Commission from improving upon the terms of that agreement if necessary to provide equitable and fair treatment of employees affected by any consolidation or merger in the future.* Thus, it will be seen that there has been no difference in thought and desire between the committee and the sponsors of the Harrington amendment. In fact the provision contained in the original bill had the approval of 20 of the 21 railroad brotherhoods. And, it is significant in this connection that the one brotherhood which did not agree to our language had never asked for anything other than that the entire consolidation provision be left out of the bill and the matter be left at this time as a mater for collective bargaining.

"The conferees have struggled long and hard to agree upon language that would be mutually satisfactory to all the Senate conferees, the brotherhoods, and the railroads. We believe the language now proposed as a compromise is a fair and just solution. We also understand that it is acceptable to all who are to be affected by the provision. I sincerely hope that it will have the approval of the House as I do not believe anything further can be done if this fails to be acceptable. If this should fail then I am fearful that it would not be possible to obtain any legislation on the subject. I do not believe that any one who is truly interested in the welfare of the employees, or in helping the plight of the distressed railroad industry would want such a result. *Nor should anyone overlook the fact that the adoption of this amendment as agreed to by the conferees gives railroad workers protection against sudden dismissal and financial assistance* that is not enjoyed by workers in any other industry. And this is true without any exception or qualification whatsoever." (Italics supplied.)

The foregoing explanation seems to us to establish beyond question that the intention of Congress in writing the first sentence of Section 5(2)(f) was not only to permit the Commission to provide the principles of the Washington Agreement in consolidation proceedings, but also to use language which "would not preclude the Commission from improving upon the terms of that agreement if necessary to provide equitable and fair treatment of employees affected by any consolidation or merger in the future". Moreover, the "protection" intended is pointedly described as not only against sudden dismissal but also as providing "financial assistance". No statement by Congress could more expressly refute the Commission's construction of Section 5(2)(f) in this case.

The statements by Congressmen Lea and Wolverton represented the only extensive explanations of the meaning and intent of the provisions of Section 5(2)(f) offered to the House by members of the committee which drafted the language. These explanations were not challenged or

contradicted by any member of the committee.[59] They support the construction of the section here urged by appellant, and they not only fail to support but expressly refute the interpretation of the Interstate Commerce Commission.

Another attempt to recommit the bill for reasons among others that it did not afford the full measure of protection for employees desired by sponsors of the Harrington amendment was defeated in the House on August 12, 1940, by a vote of 212 to 112 and the bill passed the House on that date 247 to 75.[60]

On August 30, 1940, the bill was submitted to the Senate[61] and after debate which only briefly concerned the Harrington amendment, the bill was passed on September 9, 1940.[62] On September 18, the bill was signed by the President.

The legislative history is lengthy because of the struggle over the Harrington amendment in the House. It is important, however, because it shows what in our opinion is a conclusive demonstration that the provisions of Section 5(2)(f) were at all times a subject of controversy only as between two opposing labor groups, one insisting that the statute should require that no employee was to be deprived of employment as a result of transactions approved under Section 5(2), and the other satisfied that the measure of protection was to be left to the Commission's

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[59] On the contrary, to the extent that additional explanation was offered by other members of the Conference Committee, it is in entire accord with the views of Representatives Lea and Wolverton, although not as specifically pertinent to the precise issue here under consideration. See 86 Cong. Rec., Part 9, p. 10187 [Representative Halleck]; *Id.* at 10192 [Representative Crosser]. The same is true of the very limited explanation offered in the Senate by members of the Conference Committee: 86 Cong. Rec., Part 10, pp. 11269-11270 [Senator Wheeler]; *Id.* at p. 11545 [Senator Reed].

[60] 86 Cong. Rec., Part 9, 76th Cong., 3d Sess., pp. 10193-10194.

[61] 86 Cong. Rec., Part 10, 76th Cong., 3d Sess., p. 11269.

[62] *Id.* at p. 11766.

judgment of what was fair and equitable under the circumstances. A compromise resulted. That compromise was never in any sense a subtraction from the measure of protection granted by the first sentence in Section 5(2)(f).[68] The entire legislative history is devoid of a suggestion by anyone at any time that the measure of protection which the carriers and labor had voluntarily agreed to in the Washington Agreement and which they had sought to have insured by statutory language was to be limited or modified by the specific requirements of the Harrington amendment which, as modified, is now embodied in the second sentence of Section 5(2)(f). Never was a proposal made or suggested that the discretionary power vested in the Commission by the first sentence of Section 5(2)(f) was to be eliminated by the succeeding sentences. On the contrary, the few statements made by those who drafted the section which bear directly on the point in issue are precisely to the contrary of the Commission's asserted lack of authority in this case.

IV.

The District Court's Conclusion that the Commission's Construction of the Statute Is Entitled to Great Weight Is Without Merit.

In sustaining the Commission's construction of Section 5(2)(f), the District Court relied in part on certain Commission decisions which were cited by the Government in its briefs to that court (R. 72). These decisions were cited by the District Court in support of the proposition that the Commission's construction of the statute in the present case is in accord with its prior construction of the statute, and on that account entitled to great weight (R. 71-72). There are two reasons why the judgment below in this respect is erroneous.

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[68] Obviously if it ever was intended as such it would not have been, as Representative Wolverton stated it was, "acceptable to all who are to be affected by the provision." *Supra* page 52.

In the first place, only one of the decisions relied upon has any relevance to the issue in this case. That decision, *Chicago, Milwaukee, St. Paul & Pac. Ry. Co. Trustees et al. Construction, etc.*, 257 I. C. C. 292, raised the identical issue here present and was decided by a majority of the Commission adversely to petitioner, Railway Labor Executives' Association, three Commissioners dissenting.[64] It was this decision, and this decision alone, which was relied upon by the Commission in reaching its conclusions in the present case (R. 30, 32). In the other cases cited by the District Court the issue of the proper construction of Section 5(2)(f) was not even raised for the reason that the protection there afforded under the minimum requirements of the second sentence of the section was considered adequate under the facts and circumstances present in those cases.

In the second place, it was established by this Court in *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373, 380, that the Commission's construction of a statute under circumstances such as are present in this case is not entitled to great weight.[65] Here, as there, the construction placed upon the provisions of the statute in question is not only opposed to the intention of Congress in enacting the measure, but is also incompatible with decisions of this Court considering that legislative history, as will be shown in the next section of this brief. Under such circumstances, administrative construction no matter how definitely settled by the Commission does not warrant affirmance.

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[64] 257 I. C. C. 292 at 294. No appeal was taken from the decision. Unlike the present case, the date for completion of the project ran out in 1944 which still left 2 years of protection under the Commission's order. See 257 I. C. C. 292 at 293.

[65] Unlike the present case where the interpretation of Section 5(2)(f) has been reached by the Commission in only one other case, the Commission's construction rejected in the cited case had been followed in a considerable number of cases.

Moreover, it is readily apparent from examination of decisions of this Court that the rule regarding the weight to be attached to administrative interpretation of statutes is not slavishly or uniformly followed in all cases. The rule arises out of certain practical considerations of which the courts have availed themselves when called upon to interpret statutes. These considerations have greater or less significance depending upon the circumstnces of the individual case. Properly interpreted, the rule does not bind the court no matter how well established the administrative construction. *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 280. The rule applies with considerably less force if the administrative interpretation does not "embody the results of any specialized departmental knowledge or experience". *Haggar Co.* v. *Helvering*, 308 U. S. 289, 298. It "has peculiar weight when it involves a contemporaneous construction of a statute". *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315. It is entitled to greater or less respect depending upon whether the administrative interpretation has or has not been "continuous". *Wisconsin Central R. Co.* v. *United States*, 164 U. S. 190, 205.

Judged in the light of these guiding factors, the Commission's construction falls far short of satisfying the requirements for invocation of the rule.

The question here involved has no technical aspect which would give the Interstate Commerce Commission any inherent advantage growing out of its specialized knowledge in the field of transportation. On the contrary, the advantage is rather with the Court whose traditional function it is to interpret the meaning and purpose of statutes.

No settled interpretation of the question presented here has been established by the Commission. As stated above, this issue of construction has been presented for decision by the Commission in only one other case,[66] and in that

[66] *Chicago, Milwaukee, St. Paul & Pac. Ry. Co. Trustees et al. Construction*, 257 I. C. C. 292.

case three Commissioners dissented. Further, the interpretation first made in that case was not contemporaneous with the enactment of the statute.

Finally since it is quite clear from the legislative history of the section that the Commission's interpretation is contrary to the intent of Congress, it cannot be binding on the Court.

V.

The Commission's Construction of Section 5(2)(f) Is Incompatible With This Court's Previous Interpretation of the Statute.

The precise issue in this case has never before been considered by the courts. There are, however, two decisions by this Court which, in considering the problem of employee protection under the Interstate Commerce Act, interpret the intent of Congress in enacting the provisions of Section 5(2)(f) consistently with our construction of the section and contrary to that urged by the Commission. These decisions are *United States* v. *Lowden*, 308 U. S. 225, and *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373. In deciding these cases, this Court examined the legislative history of Section 5(2)(f) and concluded that the purpose of that legislation was simply to make mandatory the protection for workers that had previously been discretionary.[67] The Court's conclusion in this respect is directly confirmed by Congressional comment on the intent and purpose of the first sentence of Section 5(2)(f) set forth above in the section on legislative history. There is no question that prior to the mandatory provisions of Section 5(2)(f) the Commission had discretion to provide the protection of the Washington Agreement if it so desired, wherein the period of protection commences with the consummation of the project and the time when the employee is adversely

[67] 308 U. S. 225 at 239; 315 U. S. 373 at 379.

affected rather than from the effective date of the Commission's order.[68] Consequently, the Commission's interpretation that the requirements of the second sentence of Section 5(2)(f) preclude its authority to exercise discretion theretofore available to it prior to the passage of Section 5(2)(f) squarely conflicts with this Court's view of Congressional intent.[69]

A further anomaly created by the Commission's negation of authority under Section 5(2)(f) is that it does possess under the *abandonment provisions* of the Interstate

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[68] Such protection was afforded by the Commission in the *Lowden* case to which repeated reference was made by Congress in its consideration of the provisions of Section 5(2)(f), *supra*. There the Commission, in authorizing a lease subject to certain conditions for the protection of employees, provided a period of protection, in the case of dismissed employees, from the date the employee was deprived of employment, and in the case of displaced employees from the time when operations under the lease began. This protection of employees was set aside by a federal district court (*Lowden* v. *United States*, 29 F. Supp. 9), but this decision was reversed by this Court. *United States* v. *Lowden*, 308 U. S. 225. At the time this case was decided (1938), the Interstate Commerce Act contained no mention of protection to employees adversely affected by coordination transactions, but the protection granted was upheld as a valid exercise of the Commission's authority under Section 5(4)(b) of the Transportation Act of 1920 to protect the public interest generally.

[69] This same view of the intent of the statute was taken by the lower court in *Railway Labor Executives' Association* v. *United States*, 38 F. Supp. 818, wherein Chief Judge Groner, then serving as the presiding judge of the three judge court which decided the case, said of the newly enacted Section 5(2)(f) (pp. 823, 824):

> "These discussions [the legislative history of Section 5(2)(f)] resulted only in the enactment of a provision requiring a 'fair and equitable arrangement' to protect employees in consolidation cases *and other more specific provisions* therefor.
>
> * * * *
>
> ". . . what was in 1920 left discretionary had become in 1940 an acknowledged right. To share with displaced personnel a part of the gain was then and now a necessary factor in the accomplishment of an efficient rail system." (Italics supplied.)

Commerce Act [70] authority to provide the very protection sought by appellant in this case and afforded by it in the *Lowden* case.[71] *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373. Accordingly, under the Commission's view of the statute, which was undeniably available in terms of protection when the Interstate Commerce Act contained no requirements for protective conditions is now denied by a statutory provision which makes the imposition of an equitable arrangement for the protection of employees mandatory. Obviously, Congress intended no such incongruous result or inconsistency of statutory policy. The short answer is that not only the legislative history and the decisions of this Court but the common-sense meaning of the language of the statute itself are all arrayed against the Commission's interpretation.

CONCLUSION

For the reasons stated, the judgment of the District Court is erroneous and should be reversed with directions to set aside as contrary to law that part of the Commission's report and order of April 7, 1948, which holds that the Commission lacks statutory authority, in providing an equitable arrangement for the protection of employees, to extend the period of protection beyond four years from the effective date of said order; and further directing the Commission to take such action as will provide a fair and

[70] 49 U. S. C. § 1(18)-(20).

[71] The particular irony thus created as far as this case is concerned is that a considerable number of the employees affected by the New Orleans project will be dismissed from employment as a result of abandonments authorized by the Commission. But because of the fact that coordination transactions are also involved the Commission properly considered the abandonment and construction as component parts of an inseparable plan of operation (R. 32), and treated the entire problem of employee protection as subject to the mandatory provisions of Section 5(2)(f).

equitable arrangement for employee protection consistent with the basic statutory purpose and compatible with the requirements of this case.

Respectfully submitted,

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